



**IN THE
Supreme Court of the United States**

OCTOBER TERM, 1978

No. 77-1486

**JOSE GUADALUPE GARZA, JR.,
Petitioner,**

versus

**THE UNITED STATES OF AMERICA,
Respondent.**

**REPLY BRIEF FOR PETITIONER
PURSUANT TO RULE 24(4)**

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QUESTIONS IN DISPUTE

1. Whether the Drug Enforcement Administration's pretrial destruction of the heroin was done in good faith?
2. Whether there existed a *valid* reason for the delay?

STATEMENT

For the purposes of this reply brief, Petitioner will adopt substantially, the testimony of the trial court as

it is summarized in both the Petitioner's writ and the government's brief in opposition.

ARGUMENT

The government in its brief in opposition states that one of the questions presented is "whether the Drug Enforcement Administration's 'good-faith' pretrial destruction of the heroin that Petitioner was charged with distributing deprived him of a fair trial," apparently deriving this question from a misinterpretation that the "Petitioner does not contend that the government acted in bad-faith , and the record furnishes no support for such an inference." (Brief p. 4)

To be more accurate, the question should be, was the destruction done in good faith?

In order to show the conflict in the government's position, attention will be drawn to the factors to be considered in a delay and the factors to be considered when evidence is destroyed. In the former, there are four factors which need to be weighed in determining the accuser's rights;

1. the length of the delay;
2. the reason for the delay;
3. whether the Defendant has asserted his right;
4. the prejudice caused by the delay.

Barker v. Wingo, 407 U.S. 514, 33 L.Ed.2d 101, 92 S.Ct. 2182, *United States v. Mac Donald*, ____ U.S. ____, 56 L.Ed.2d 18, 98 S.Ct. ____ (1978).

In the latter, the factors are:

1. Was the evidence material to question of guilt or degree of punishment?
2. Was the Defendant prejudiced by its destruction?
3. Was the government acting in good faith when it destroyed the evidence?

Brady v. Maryland, 373 U.S. 83, 87, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963); *United States v. Heiden*, 508 F.2d 898, 902 (9th Cir. 1974); *United States v. Sewar*, 468 F.2d 236 (9th Cir. 1972), cert. denied, 410 U.S. 916, 93 S.Ct. 972, 35 L.Ed.2d 278 (1973); *United States v. Bryant*, 124 U.S. App. D.C. 132, 141, 439 F.2d 642, 651 (1971); *United States v. Keogh*, 391 F.2d 138, 147 (2d Cir. 1968). See Comment, "Judicial Response to Governmental Loss or Destruction of Evidence," 39 U. Chi. L. Rev. 542, 563-65 (1972), *United States v. Picariello*, 568 F.2d 222, 227 (5th Cir. 1978).

The contradiction in the government's stand occurs when they take the position that the reason for the delay was a good-faith investigation, yet during that time they destroyed the evidence in "good faith". Their argument is disjunctive, either there was no investigation or the evidence was not destroyed in good faith. (As opposed to bad faith or recklessly) Petitioner feels that the lack of an investigation is the

more valid reason, and would attempt to show the Court that the destruction of the heroin routinely done upon the conviction of the co-conspirators is strong evidence that the government considered the matter closed.

In *Lovasco* the Court stated: that in each case, the prejudice to the defendant is to be weighed against the validity of the government's reason for delay. *United States v. Lovasco*, 431 U.S. at 796, 97 S.Ct. 2044. Petitioner would point out that the reason in this case is a sham, and that the government only discovered an obscure witness to a collateral matter at a time when it needed to explain the delay.

In order to emphasize this position, the Petitioner would ask the Court to look at the government's indictment, remembering that the defendant is guilty as a co-conspirator or principal since he, himself, never delivered any heroin.

Everything that is alleged in the indictment was known to the government in 1973. There are three overt acts alleged and every witness to those acts was known to the government in 1973. Not one new witness or evidence was discovered or looked for during the delay which would further prove or disprove any of those overt acts.

In Count 2, the sale portion of the indictment, the only witnesses to that were the agents and the co-defendants. (Note: the co-defendant's may have been potential witnesses and the government may have had a valid reason to delay until after their conviction but

that would have only been a month's delay.)

The real inconsistency is exaggerated by Counts 3 and 4. There the defendant is charged with using a telephone to further the conspiracy yet there are only two witnesses to these events, the government's agent and the defendant. (Record p. 31) How then can the government delay indicting a person for using a telephone, when there will never be any more evidence that the phone call occurred or did not occur?

The crime itself was a buy-bust situation where the government's agents acting undercover arranged to buy heroin. The only material witness, normally, are the agents and the chemist. The point is that at the time of the buy all the witnesses are known. This can best be explained by hypothesis; suppose that in 1973 the government had moved for continuance. At that time it could not have argued that it needed time to further investigate because there would have been nothing to investigate for. To have predicted in 1973 that it would produce the witness, that it ultimately produced, the government would have had to be clairvoyant. The other witness which the government did not produce would likewise have been useless as grounds for continuance since the Court would hardly allow time to gather evidence which would not even be used.

The only investigation in this case was a conclusion by the trial judge. Not one witness testified that there was an investigation going on. The only testimony being that two witnesses were later talked to. The real fallacy is that not only was there no evidence of any reason for the delay but the delay itself is not explain-

ed. The government offered *no* explanation for the length of time (44 months) before it talked to the witnesses. There was no evidence that the witnesses were unavailable or unidentified or even that the government was busy on other matters.

Surely the Court will require the government to come up with a *valid* reason which at least explains the delay.

To allow this decision to stand would allow the government to rubber stamp every delay with the reason INVESTIGATION regardless of the facts.

CONCLUSION

The petition for Writ of Certiorari should be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that three copies of the above Reply Brief for Petitioner have been served upon Honorable Wade H. McCree, Jr., Solicitor General of the United States, Department of Justice, Washington, D.C. 20530, and one copy has been served upon Honorable James Gough, Jr., United States Attorney, P.O. Box 61129, Houston, Texas 77208, by United States Air Mail, with adequate postage affixed thereto, this ____ day of August, 1978.

OF COUNSEL